IN THE

# SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-722

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JULIAN M. CARROLL, Governor, Commonwealth of Kentucky
COMMONWEALTH OF KENTUCKY, Ex Rel. Julian M. Carroll, Governor - - Petitioners,

vs.

DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, United States of America
F. DAVID MATHEWS, Secretary of Health, Education and Welfare, United States of America
OFFICE OF EDUCATION, United States of America
TERRELL H. BELL, Commissioner of Education, United States of America
BOARD OF EDUCATION OF JEFFERSON COUNTY, KENTUCKY - - - Respondents.

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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No. _____

JULIAN M. CARROLL, Governor, Commonwealth of Kentucky
COMMONWEALTH OF KENTUCKY, Ex Rel. Julian M. Carroll, Governor - - - *Petitioners,*

*v.*

DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, United States of America
F. DAVID MATHEWS, Secretary of Health, Education and Welfare, United States of America
OFFICE OF EDUCATION, United States of America
TERRELL H. BELL, Commissioner of Education, United States of America
BOARD OF EDUCATION OF JEFFERSON COUNTY, KENTUCKY - - - - - - - *Respondents.*

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

## OPINIONS BELOW

The August 23, 1977 Opinion of the United States Court of Appeals for the Sixth Circuit is reported at 561 F. 2d 1, and is set out in the Appendix to this Petition ("App.") at p. 1A. The March 19, 1976 Memorandum Opinion and Order of the United States District Court for the Western District of Kentucky, Louisville Division, is reported at 410 F. Supp. 234, and is set out in the App., p. 15A. Though not the subject of this Petition, the decision of the United States District Court for the Western District of Kentucky, Louisville Division, in the connected case, *Jefferson County Board of Education* v. *Julian M. Carroll, Governor, etc., et al.,* Civil No. 76-0248-L(G) (W.D. Ky., Filed Aug. 27, 1976) is set out in App., p. 27A.

## JURISDICTION

The Judgment of the United States Court of Appeals for the Sixth Circuit was entered on August 23, 1977 (see Clerk's confirmation of entry of Judgment, App., p. 14A). This Court has jurisdiction under Title 28 U.S.C. §1254(1).

## QUESTIONS PRESENTED FOR REVIEW

1. Whether 20 U.S.C. §1652(a), 20 U.S.C. §1228, and Section 315(b) of Pub.L. No. 94-94, which prohibit the use of federal funds for court ordered busing to achieve school desegregation, are unconstitutional as violative of the due process provisions of the Fifth



Amendment of the Constitution of the United States, and violative of the implied separation of powers requirements of the Constitution of the United States, as an interference by the legislative branch of the federal government with the powers of the federal courts to enforce their desegregation busing orders.

The District Court held that such statutes were not unconstitutional. The Court of Appeals for the Sixth Circuit did not reach the question, holding that there was no case or controversy because no federal funds were available to pay for court ordered busing in any event, and thus the statutes under attack are meaningless.

2. Whether federal funds are in fact available, within the discretion of the Department of Health, Education and Welfare, to supplement state and local funds required to cover the extraordinary cost of court ordered busing.

Petitioner, Commonwealth of Kentucky, contends that such funds are available to the state and local school board under the discretionary programs and projects provided for in the Federal Emergency School Aid Act, 20 U.S.C. §§1601-1619, but for restrictions set forth in 20 U.S.C. §1652(a), 20 U.S.C. §1228, and Section 315(b) of Pub.L. No. 94-94. The District Court and the Court of Appeals for the Sixth Circuit both held that federal funds for busing were not available irrespective of the restrictive statutes.

## CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

1. United States Constitution, Amendment V:

"[N]or shall any person * * * be deprived of life, liberty, or property, without due process of law * * *."

2. Pub.L. No. 92-318, Title VIII, §802(a); 86 Stat. 371; 20 U.S.C. §1652(a):

"Prohibition against use of appropriated funds for busing

(a) No funds appropriated for the purpose of carrying out any applicable program may be used for the transportation of students or teachers (or for the purchase of equipment for such transportation) in order to overcome racial imbalance in any school or school system, or for the transportation of students or teachers (or for the purchase of equipment for such transportation) in order to carry out a plan of racial desegregation of any school or school system, except on the express written voluntary request of appropriate local school officials. No such funds shall be made available for transportation when the time or distance of travel is so great as to risk the health of the children or significantly impinge on the educational process of such children, or where the educational opportunities available at the school to which it is proposed that any such student be transported will be substantially inferior to those opportunities offered at the school to which such student would otherwise be assigned under a non-



discriminatory system of school assignments based on geographic zones established without discrimination on account of race, religion, color, or national origin."

3. Pub.L. No. 90-247, Title IV, §420, as added, Pub.L. No. 93-380, Title II, §242; 88 Stat. 519; 20 U.S.C. §1228:

"Prohibition against use of appropriated funds for busing—

No funds appropriated for the purpose of carrying out any applicable program may be used for the transportation of students or teachers (or for the purchase of equipment for such transportation) in order to overcome racial imbalance in any school or school system, or for the transportation of students or teachers (or for the purchase of equipment for such transportation) in order to carry out a plan of racial desegregation of any school or school system * * *"

4. Pub.L. No. 94-94, Section 315(b); 89 Stat. 474:

"(b) No funds appropriated in this Act [Education Division and Related Agencies Appropriation Act, 1976] may be used for the transportation of students or teachers (or for the purchase of equipment for such transportation) in order to overcome racial imbalance in any school or school system, or for the transportation of students or teachers (or for the purchase of equipment for such transportation) in order to carry out a plan of racial desegregation of any school or school system."

5. Provisions of the Emergency School Aid Act, Pub.L. No. 92-318, Title VII, §§702, 706, 707 and 708; 86 Stat. 354, 356, 359 and 360, 20 U.S.C. §§1601, 1605 and 1607, as applicable here, are set out in App., pp. 39A to 41A.

## STATEMENT OF THE CASE

Petitioner, Julian M. Carroll, Governor and Chief Executive of the Commonwealth of Kentucky, brought this action against the United States Department of Health, Education and Welfare ("HEW"), and its officers and subordinate agency, and the Board of Education of Jefferson County, Kentucky, for a declaration of rights to determine the respective financial obligations of Kentucky and the federal government to fund the extraordinary cost involved in the transportation of over 22,000 students as required by Judgment of the District Court to desegregate the public school system in Jefferson County, Kentucky.[1] Jurisdiction in the United States District Court was based on 28 U.S.C. §1331(a) as to the questioned validity of federal statutes restricting the use of federal funds for busing, and upon the doctrine of pendent jurisdiction insofar as the construction and validity of state statutes were involved.

[1] *See Newburg Area Council, Inc.* v. *Board of Education*, 489 F. 2d 925 (6th Cir. 1973), *vacated*, 418 U. S. 918, 94 S. Ct. 3208, 41 L. Ed. 2d 1160 (1974); *Newburg Area Council, Inc.* v. *Board of Education*, 510 F. 2d 1358 (6th Cir. 1974), *cert. denied*, 421 U. S. 931, 95 S. Ct. 1658, 44 L. Ed. 2d 88 (1975); *Newburg Area Council, Inc.* v. *Gordon*, 521 F. 2d 578 (6th Cir. 1975); *Cunningham* v. *Grayson*, 541 F. 2d 538 (6th Cir. 1976), *cert. denied*, 429 U. S. 1074, 97 S. Ct. 812, 50 L. Ed. 2d 792 (1977).



Governor Carroll contended before the District Court that state funds could not be used for court ordered busing because of restrictions in the Kentucky Constitution and statutes; that federal funds could be made available to help offset the cost of court ordered busing but for the provisions of 20 U.S.C. §1652(a), 20 U.S.C. §1228, and Section 315(b) of Pub.L. No. 94-94, which forbid the use of federal funds for the transportation of students in order to achieve desegregation; and that these federal statutes are unconstitutional under the Fifth Amendment and the separation of powers provisions of the United States Constitution.

The District Court ruled, (1) that the state constitution and statutes did not forbid use of state funds for busing, and (2) that the federal statutes forbidding use of federal funds for busing were constitutional (App., 15A). The Court of Appeals for the Sixth Circuit affirmed (App., p. 1A), but did not reach the issue of the constitutionality of the federal statutes, holding there was no justiciable issue in this regard because there were no federal funds available to the states and local school boards for busing.

In a connected case before the same District Court, *Jefferson County Board of Education* v. *Julian M. Carroll, Governor, etc., et al.*, the constitutionality of House Bill 168 enacted by the 1976 Kentucky General Assembly was put in issue, and by the District Court's Memorandum Opinion and Order (App., p. 27A), affirmed by the Court of Appeals for the Sixth Circuit, 561 F. 2d 1 (App., p. 1A), it was held that insofar as it limited the use of state funds for court ordered busing

and provided limitations upon the local school boards' power to transport students beyond their nearest school, House Bill 168 was unconstitutional as violative of the equal protection provisions of the Fourteenth Amendment of the United States Constitution, and as constituting an interference with the federal court's power to enforce its desegregation by busing order.

This Petition is limited to a plea that this Court review the decisions of the courts below *only* insofar as they uphold, or decline to rule on, the constitutionality of the federal statutes restricting the use of federal funds to aid or assist the states' and local school boards' financial burden brought on by court ordered busing to achieve school desegregation.

## REASONS FOR GRANTING THE WRIT

Petitioner does not ask for a review of the decision nullifying House Bill 168 which was ruled to be an unconstitutional restriction of the use of state funds to implement court ordered busing. But, there appears to be a complete incongruity in the law if the federal statutes accomplishing the same end are valid. Stated otherwise, the courts below have in this case created a dual standard—one applying to the Federal Congress permitting it to enact legislation forbidding use of federal funds for busing, and one applying to state legislatures condemning such legislation.

In *Bolling* v. *Sharpe,* 347 U. S. 497, 74 S. Ct. 693, 98 L. Ed. 884 (1954), this Court required the desegregation of the federally supported and operated District of Columbia school system, stating:



> "In view of our decision that the Constitution prohibits the states from maintaining racially segregated public schools, *it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government."* (Emphasis added.)

It is submitted that the apparent inconsistency in the law as announced in the decisions here sought to be reviewed involves basic questions of constitutional interpretation, and matters of such general public importance as to justify an exercise of this Court's jurisdiction.

Kentucky's interest in the matter is not an abstract concern. The drain on state and local funds due to transporting an additional 22,000 students in Jefferson County is quite real and devastating. But, Petitioner is not asking that this financial burden be totally lifted by the federal government, nor is he contending that the state has any demand on any federal funds for busing.

The state merely wants the right to apply to HEW for assistance in meeting the cost of busing, which assistance could be granted under the discretionary programs and projects of the Emergency School Aid Act, Title VII of Pub.L. No. 92-318, 20 U.S.C. §1601, et seq., (App., p. 38A).

HEW argued in the courts below that irrespective of the proscriptions of the federal statutes this Court is requested to review, there are no federal programs under which funds could be used for busing, and therefore the three federal statutes restricting the use of

federal funds for busing, enacted by three separate sessions of Congress, are meaningless and of no effect. In effect, HEW contends that these statutes are not subject to judicial review by Petitioner or anyone else.

The same Act, of which the Emergency School Aid Act is a part (Pub.L. No. 92-318), includes in its Title VIII, §802 (20 U.S.C. §1652) the first enacted restriction against use of federal funds for busing. That section contains, however, an exception not in subsequent similar statutes, that such funds can be so used "on the express written voluntary request of appropriate local school officials." The legislative history of Pub.L. No. 92-318 includes Senate Report 92-604 explaining a Senate amendment making this exception, as follows:

> "Transportation to achieve desegregation has been undertaken in communities throughout the nation—as a matter of wholly voluntary local education policy, or under Federal court or administrative order to remedy unconstitutional discrimination, or under State law. Although title VII [the Emergency School Aid Act] does not require the transportation of students, *funds under title VII could be used at the request of local school officials to assist in paying the cost of desegregation-related transportation.*
>
> The Committee believes that a prohibition against Federal assistance to meet the cost of desegregation-related transportation at the request of local school authorities would result in additional tax levies at the local level, or cutbacks in vital education services in many of these communities." (U. S. Code Cong. and Admin. News 1972, p. 2605; emphasis added.)



This legislative history shows that Congress thought funds were available under the Emergency School Aid Act to assist in paying the cost of busing. This is also entirely consistent with the announced purpose of the Emergency School Aid Act to,

> "* * * provide financial assistance—(1) to meet the special needs incident to the elimination of minority group segregation and desegregation among students and faculty in elementary and secondary schools * * *." 20 U.S.C. §1601, App., p. 39A.

The holding of the Court of Appeals for the Sixth Circuit that no federal funds are available to offset the cost of busing, and thus there is no justiciable controversy as to the validity of statutes forbidding such use of federal funds, flies in the face of the legislative history of the Emergency School Aid Act, and its stated purpose, and for these reasons this Court is urged to review the matter.

## CONCLUSION

The Court is respectfully urged to grant the Petition for Certiorari.

Respectfully submitted,

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# APPENDIX

# UNITED STATES COURT OF APPEALS
## FOR THE SIXTH CIRCUIT

**Nos. 76-2525-26, 76-2158**

---

JULIAN M. CARROLL, Governor, et al., - - - - *Defendants-Appellants,*

*v.*

BOARD OF EDUCATION OF JEFFERSON COUNTY, KENTUCKY, et al., - *Plaintiffs-Appellees,*

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JULIAN M. CARROLL, Governor, et al., - - - - - *Plaintiffs-Appellants,*

*v.*

DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, et al., - - *Defendants-Appellees.*

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APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY

---

**OPINION**—Decided and Filed August 23, 1977

Before: PHILLIPS, Chief Judge, PECK and ENGEL, Circuit Judges.

PHILLIPS, Chief Judge. These consolidated appeals are another chapter in the litigation involving the desegregation of the schools of Jefferson County, Kentucky.[1]

---

[1]See *Newburg Area Council, Inc.* v. *Board of Education*, 489 F. 2d 925 (6th Cir. 1973), *vacated*, 418 U. S. 918 (1974); *Newburg Area Council, Inc.* v. *Board of Education*, 510 F. 2d 1358 (6th Cir. 1974), *cert. denied*, 421 U. S. 931 (1975); *Newburg Area Council, Inc.* v. *Gordon*, 521 F. 2d 578 (6th Cir. 1975); *Cunningham* v. *Grayson*, 541 F. 2d 538 (6th Cir. 1976), *cert. denied*, ___ U. S. ___ (1977), 45 U.S.L.W. 3509.

The principal question concerns the constitutionality of a State statute which would thwart the desegregation plan adopted by the district court. The district judge declared portions of this statute to be unconstitutional. We affirm.

Also involved on this appeal is a challenge by State officials to the constitutionality of three federal statutes prohibiting the expenditure of federal funds on school busing for purposes of desegregation. For the reasons hereinafter set forth, we conclude that there is no case or controversy on the present appeal requiring adjudication of the constitutionality of the three challenged federal statutes.

## I.

On July 30, 1975, the district Court entered a judgment requiring the implementation of a plan for school desegregation, which subsequently was approved by this court in *Cunningham* v. *Grayson, supra,* 541 F. 2d 538. On September 15, 1975, plaintiffs in No. 76-2158 filed a declaratory judgment action contending that the allocation of state funds to the Jefferson County Board of Education pursuant to the Kentucky Foundation Program Act, K.R.S. ch. 157A, for transportation purposes should be computed on the basis of transportation of students within the county to the nearest school available to them. The plaintiffs in that case relied upon § 183 of the Kentucky Constitution, which requires the General Assembly by appropriate legislation to provide for an "efficient" system of common schools throughout the state. The argument was made that "no one can seriously contend that cross district busing is an efficient method of operating a school system." Senior District Judge James F. Gordon rejected this contention in an opinion published at 410 F. Supp. 234 (W.D. Ky. 1976), saying:

> We need not reach the ultimate definition of what is an "efficient system of common schools throughout the state." At the very least an efficient system of schools



> is a system which exists and operates. To exist the Jefferson County schools must be operated and maintained in a constitutional manner, as prescribed by the Fourteenth Amendment to the Constitution of the United States. The transportation of over 22,000 students as provided for in the desegregation order of July 30, 1975, was and is necessary to dismantle an unconstitutional school system and to create a system compatible with the guarantees of the Fourteenth Amendment. Given the state's constitutional duty to provide public education in Kentucky and to fund the public school system that is created, the burden of paying for the addtional cost of transporting the students required to be bused under the desegregation order falls on the state, assuming the local school district is unable to meet the financial obligation of providing the required transportation. *See* K.R.S. 158.110. In short, once the citizens of Kentucky made the voluntary commitment to educate the children of this state in public schools neither the Kentucky General Assembly nor those individuals responsible for discharging the duties imposed on them by the state constitution and the Foundation Program Act can abrogate those duties merely because the monetary obligation becomes unexpectedly large or even onerous.
>
> • • •
>
> In conclusion we hold that the Superintendent of Public Instruction, in computing the transportation funds available to Jefferson County, is to include in his computation under the provisions of K.R.S. Chapter 157A, all transportation costs of Jefferson County in the identical manner in which transportation costs are determined under K.R.S. 157.090 for all other school districts in the state. 510 F. Supp. at 238.

The above-quoted opinion of Judge Gordon was announced on March 19, 1976. On March 29, 1976, the General Assembly enacted into law House Bill No. 168 which became effective immediately. A copy of this statute is made an appendix to this opinion.

The constitutionality of this statute was attacked by the Jefferson County Board of Education. In an opinion announced August 27, 1976, the district court held §§ 1 and 2 and ¶¶ 1, 2 and 3 of § 3 of the statute to be unconstitutional. With respect to ¶¶ 1 and 2 of § 3 Judge Gordon said:

> Paragraphs 1 and 2 in essence state that local school boards may provide money from their general funds for the transportation of elementary school students to the nearest school able to accommodate the child in his particular grade. The obvious effect of these paragraphs is that it allows or authorizes local school boards to refuse to expend funds for the transportation of elementary school students beyond the nearest school able to provide space for the student in the appropriate grade level.
>
> The defendant contends these first two paragraphs are not unconstitutional because the legislature has not *prohibited* school boards from expending their funds in transporting elementary school students beyond the nearest available school which can seat that child in his required class but merely gives the school board that *discretion* if it wishes to avail itself of that authority. This argument is unpersuasive when juxtaposed the legal responsibilities of the Jefferson County Board of Education. Paragraphs 1 and 2 are patently unconstitutional insofar as they give the Jefferson County Board of Education the discretion to refuse to provide transportation for elementary school students beyond the nearest school able to provide a space in the appropriate classroom for the transported student. This discretion has the effect of annulling our desegregation order of July 30, 1975, which *requires* the Jefferson County Board of Education to dismantle its previously unconstitutional school system by transporting some 22,000 students to assigned schools within the school district. Thus, if the Court determined that insofar as Jefferson County was concerned paragraphs 1 and 2 in Section 3 of H.B. 168 were constitutional, we would in effect be allowing the General Assembly of Kentucky to circumvent our desegregation order. We cannot take such a position. *Bradley* v. *Milliken*, 433 F. 2d 897, 902 (6th Cir. 1970).
>
> In conclusion paragraphs 1 and 2 of Section 3 of H.B. 168 are unconstitutional insofar as they are made applicable to the Jefferson County Board of Education because they (1) conflict with this Court's duty to remove all remaining vestiges of state-imposed segregation in the Jefferson County school district, a duty imposed on this Court by the Sixth Circuit Court of Appeals in its order of December 11, 1974. *Newburg Area Council, Inc.* v. *Board of Education*, 510 F. 2d 1358 (6th Cir. 1974); *See also Newburg Area Council, Inc.* v. *Gordon*, 521 F. 2d 578 (6th Cir. 1975); and (2) conflicts with this Court's desegregation order issued July 30, 1975, a plan which was and is necessary to dismantle an unconstitutional school system and to create a system compatible with the guarantees of the Fourteenth Amendment.



This holding is clearly correct. *North Carolina State Board of Education* v. *Swann*, 402 U. S. 43 (1971); *Northcross* v. *Board of Education*, 489 F. 2d 15, 18 and 19 (6th Cir. 1973), *cert. denied*, 416 U. S. 962 (1974); *Bradley* v. *Milliken*, 433 F. 2d 897 (6th Cir. 1970), and cases therein cited. We also affirm the holding of the district court that

§§ 1 and 2 of House Bill 168 are unconstitutional for the reasons stated by the court in its memorandum opinion.

Judge Gordon further held that ¶ 3 of § 3 of the statute is unconstitutional under § 51 of the Kentucky Constitution. by concession of the parties. He ruled that ¶ 4 of § 3 is constitutional on its face, but added:

> If the Department of Education or the Jefferson County Board of Education attempted in the future to frustrate or cripple this court's order of July 30, 1975, by adoption of regulations or rules pursuant to this paragraph, the court could at that time, upon appropriate motion, strike down the offensive rule or regulation.

II.

The State officials challenge the constitutionality of 20 U.S.C. §§ 1228 and 1652(a) and Public Law 94-94, 89 Stat. 468 § 315(b), which provide that federal funds may not be spent on busing to achieve desegregation, with certain limited exceptions. In his opinion in *Carroll* v. *Department of Health, Eduction and Welfare, supra.,* 410 F. Supp. 234, 238-40, Judge Gordon ruled that these statutes are valid and constitutional.

The Secretary of Health, Education and Welfare asserts that there is no case or controversy on this issue in the present case because, irrespective of the three federal statutes under attack, no other federal statute would allow the spending of federal money on home-to-school busing in the present case. He points out that under the Emergency School Aid Act (ESAA), 20 U.S.C. §§ 1601-19, there are only twelve "authorized activities," on which ESAA money can be spent. It is stated that the Jefferson County school busing program could not qualify for federal funds under any of these twelve categories or any other statute. The Secretary asserts the three challenged federal statutes do not cause any harm to the Jefferson County school system



of the Commonwealth of Kentucky because "wiping them off the books would not free a single cent in federal funding for home-to-school transporation."

We agree with this contention. We therefore do not reach the issue of the constitutionality of the three federal statutes here challenged.

The decision of the district court holding unconstitutional §§ 1 and 2 and ¶¶ 1, 2 and 3 of § 3 of House Bill 168 is affirmed. The costs of this appeal are taxed against the appellants.

## APPENDIX

GENERAL ASSEMBLY
Commonwealth of Kentucky
Regular Session 1976
HOUSE BILL No. 168

[The following is the text of House Bill No. 168 as enacted by the General Assembly of the Commonwealth of Kentucky at the 1976 Regular Session and signed into law by Governor Julian Carroll on March 29, 1976.

Italicized matter represents language added to the indicated statutes by H.B. 168. Bracketed matter indicates deletions required by H.B. 168.]

AN ACT relating to the state financing of the transportation of public school students.

*Be it enacted by the General Assembly of the Commonwealth of Kentucky:*

Section 1. KRS 157A.090 is amended to read as follows:

(1) In determining the cost of the public common school foundation program for each district, the superintendent of public instruction shall determine the average cost per pupil per day of transporting pupils in districts having a similar

density of transported pupils per square mile of area served by not less than nine different density groups.

(2) The annual cost of transportation shall include all current costs for each district plus annual depreciation of pupil transportation vehicles calculated in accordance with the regulations of the state board of education for such districts that operate district-owned vehicles.

(3) The aggregate and average attendance of transported pupils shall include all public common school pupils transported at public expense who live one mile or more from school, provided that handicapped pupils may be included who live less than this distance from school. The aggregate and average daily attendance referred to in this subsection shall be the aggregate and average daily attendance of transported pupils the prior year adjusted for current year increases in accordance with state board of education regulations.

(4) The state board of education, by regulation, shall determine the type of handicapped pupil that qualifies for special transportation to and from school. Those qualified pupils for which the district provides special transportation shall have their aggregate days attendance multiplied by 5.0 and added to that part of the district's aggregate days attendance that is multiplied by the district's adjusted cost per pupil per day in determining the district's pupil transportation program cost for allotment purposes.

(5) The square miles of area served by transportation shall be determined by subtracting from the total area in square miles of the district the area not served by transportation, determined in accordance with the regulations of the state board of education provided that if one district authorizes another district to provide transportation for a part of its area, such area served shall be deducted from the area served by that district and added to the area served by the district providing the transportation.



(6) The density of transported pupils per square mile of area served for each district shall be determined by dividing the average daily attendance of transported pupils by the number of square miles of area served by transportation.

(7) The superintendent of public instruction shall determine the average cost per pupil per day of transporting pupils in districts having a similar density by constructing a smoothed graph of cost for all density groups as provided in subsection (1) of this section. This graph shall be used to construct a scale showing the average costs of transportation for districts having a similar density of transported pupils. Such costs shall be determined separately for county school districts and independent school districts, provided that no independent school district will receive an average cost per pupil per day in excess of the minimum received by any county district or districts. These costs shall be the costs per pupil per day of transported pupils included in the foundation program and such costs shall be recalculated each year.

*(8) In constructing the smoothed graph required in subsection (7) of this section, this smoothed graph shall be extended indefinitely as a straight line at the same cost level per pupil per day from that point at the bottom of the graph indicated by the density group with the lowest cost per pupil per day.*

*(9) For transportation allotment purposes, those districts with a higher density and higher cost per pupil per day than the density group with the lowest cost per pupil per day shall not receive a transportation allotment cost higher than that indicated by the straight line part of the graph.*

*(10)*[(8)] The cost of transporting a district's pupils from the parent school to a state vocational-technical school or to a vocational education center shall be calculated separately from the calculation required by subsections (1)

through *(10)*[(8)] of this section. The amount calculated shall be paid separately to each district from public common school foundation program funds budgeted for vocational pupil transportation, as a reimbursement based on the district's cost for providing this service. The amount of reimbursement shall be calculated in accordance with state board of education regulations. In the event that the appropriation for vocational pupil transportation in the biennial budget is insufficient to meet the total calculated cost of this service for all districts, the amount paid to each district shall be ratably reduced. For the purpose of this subsection, the parent school shall be interpreted to mean that school in which the pupil is officially enrolled in a district's public common school system.

Section 2. KRS 157.370 is amended to read as follows:

(1) In determining the cost of the foundation program for each district, the superintendent of public instruction shall determine the average cost per pupil per day of transporting pupils in districts having a similar density of transported pupils per square mile of area served by not less than nine different density groups.

(2) The annual cost of transportation shall include all current costs for each district plus annual depreciation of pupil transportation vehicles calculated in accordance with the regulations of the state board of education for such districts that operate district-owned vehicles.

(3) The aggregate and average daily attendance of transported pupils shall include all public school pupils transported at public expense who live one mile or more from school, provided that handicapped children may be included who lives less than this distance from school. The aggregate and average daily attendance referred to in this subsection shall be the aggregate and average daily attendance of transported pupils the prior year adjusted for current year increases in accordance with state board of education regulations.



(4) The square miles of area served by transportation shall be determined by subtracting from the total area in square miles of the district the area not served by transportation, determined in accordance with the regulations of the state board of education provided that if one district authorizes another district to provide transportation for a part of its area, such area served shall be deducted from the area served by that district and added to the area served by the district providing the transportation.

(5) The density of transported pupils per square mile of area served for each district shall be determined by dividing the average daily attendance of transported pupils by the number of square miles of area served by transportation.

(6) The superintendent of public instruction shall determine the average cost per pupil per day of transporting pupils in districts having a similar density by constructing a smoothed graph of cost for all density groups as provided in subsection (1). This graph shall be used to construct a scale showing the average cost of transportation for districts having a similar density of transported pupils. Such costs shall be determined separately for county school districts and independent school districts, provided that no independent school district will receive an average cost per pupil per day in excess of the minimum received by any county district or districts. These costs shall be the costs per pupil per day of transported pupils included in the foundation program and such costs shall be recalculated each biennium.

(7) The scale of transportation costs included in the foundation program for county and independent districts is determined in accordance with the provisions of KRS 157.310 to 157.440 for the biennium beginning July 1, 1960.

*(8) In constructing the smoothed graph required in subsection (6) of this section, this smoothed graph shall be ex-*

*tended indefinitely as a straight line at the same cost level per pupil per day from that point at the bottom of the graph indicated by the density group with the lowest cost per pupil per day.*

*(9) For transportation allotment purposes, those districts with a higher density and higher cost per pupil per day than the density group with the lowest cost per pupil per day shall not receive a transportation allotment cost higher than that indicated by the straight line part of the graph.*

*(10)*[(8)] The cost of transporting a district's pupils from the parent school to a state vocational-technical school or to a vocational educational center shall be calculated separately from the calculation required by sections (1) through *(9)*[(7)] of this section. The amount calculated shall be paid separately to each district from minimum foundation program funds budgeted for vocational pupil transportation, as a reimbursement based on the district's cost for providing this service. The amount of reimbursement shall be calculated in accordance with state board of education regulations. In the event that the appropriation for vocacational pupil transportation in the biennial budget is insufficient to meet the total calculated cost of this service for all districts, the amount paid to each district shall be ratably reduced. For the purpose of this section, the parent school shall be interpreted to mean that school in which the pupil is officially enrolled in a district's public common school system.

*(11)*[(9)] The state board of education, by regulation, shall determine the type of handicapped pupil that qualifies for special type transportation to and from school. Those qualified pupils for which the district provides special type transportation shall have their aggregate days attendance multiplied by 5.0 and added to that part of the district's aggregate days attendance that is multiplied by the district's adjusted cost per pupil per day in determining the district's pupil transportation program cost for allotment purposes.



Section 3. KRS 158.110 is amended to read as follows:

*(1)* Boards of education *may provide* [shall furnish] transportation from their general funds or otherwise for *any* pupil[s] of *any* [elementary] grade *to the nearest school to said pupils residence within the district* who *does* [do] not *live* [reside] within *a* reasonable walking distance *to such nearest* [of the] school of *appropriate grade level* [provided for them, and any board of education may provide transporation from its general funds or otherwise for any pupil of any grade who does not live within a reasonable walking distance from the school provided for him. The boards of education shall adopt such rules and regulations as will insure the comfort, health and safety of the children who are transported, consistent with the rules and regulations of the state board of education dealing with the transportation of pupils.]

*(2) When space is not available at the nearest school, boards of education may provide transportation from their general funds or otherwise for any pupil of any grade who does not live within a reasonable walking distance to the nearest school of appropriate grade level where space is available.*

*(3) Public elementary and scondary schools shall not change their present grade level stucture without written permission from the state board of education.*

*(4) The boards of education shall adopt such rules and regulations as will insure the comfort, health and safety of the children who are transported, consistent with the rules and regulations of the state board of education dealing with the transportation of pupils.*

Section 4. Whereas the allocation for the current school year of funds for transportation is imminent, an emergency

is declared to exist, and this Act shall become effective upon passage and approval by the Governor.

Office of the Clerk
UNITED STATES COURT OF APPEALS
For the Sixth Circuit
Cincinnati, Ohio 45202

John P. Hehman, Clerk

August 23, 1977

Mr. Robert F. Stephens
Mr. William E. Scent
Mr. Bert T. Combs
Mr. Will H. Fulton
Mr. E. Preston Young
Mr. George J. Long
Mr. Robert Greenspan

Re: Jefferson County Board of Education, et al. v. Julian M. Carroll, Governor of the Commonwealth of Kentucky, et al.
Our Nos. 76-2526, 76-2525, 76-2158
Dist. Ct. No. 76-0248L(G) & 76-0305-2

Gentlemen:

The Court today announced its decision in the above-entitled case.

A copy of the Court's opinion is enclosed, and a judgment in conformity with the opinion has been entered today as required by Rule 36, Federal Rules of Appellate Procedure.

Costs may be recovered by the Appellees as provided by Rule 39, Federal Rules of Appellate Procedure.

Very truly yours,

John P. Hehman, Clerk
By (s) Betty Tibbles
Deputy Clerk



# UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

No. C75-0305-L(G)

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JULIAN M. CARROLL, Governor, Commonwealth of Kentucky, et al. - - - *Plaintiffs*

*v.*

DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, UNITED STATES OF AMERICA, et al. - - - - - - - - *Defendants*

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## MEMORANDUM OPINION AND ORDER

On July 30, 1975, this Court entered a judgment in *Newburg Area Council, Inc.* v. *Board of Education of Jefferson County,* Civil Nos. 7045 and 7291 (W.D. Ky. 1975) *app. pending* No. 75-1737 (6th Cir.), requiring the implementation of a plan for public school desegregation in Jefferson County, Kentucky. On September 15, 1975, the plaintiffs Julian M. Carroll, Governor of Kentucky, and the Commonwealth of Kentucky filed the instant action for declaratory relief as to the responsibility for that portion of the increased cost of operating the Jefferson County public school system which would be attributed to additional busing of students required by the desegregation order.[1]

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[1]On February 23, 1976 plaintiffs moved for leave to amend their complaint. Since we have this day granted plaintiffs' motion to amend we will consider the points raised in the amended complaint, particularly the alleged unconstitutionality of several federal statutes.

This case is now before us on plaintiffs' motion for partial summary judgment and the federal defendants' motion to dismiss plaintiffs' complaint, or in the alternative for summary judgment. The Jefferson County Board of Education has responded to plaintiffs' motion and we consider this response to be a motion for summary judgment. Having concluded that there is no factual dispute between the parties and that this matter is otherwise properly before us pursuant to F.R.C.P. Rule 56, we proceed to the merits of the case.

Plaintiffs raise two arguments in their motion for partial summary judgment. They seek a declaration of rights that (1) the allocation of funds for transportation to the Jefferson County Board of Education pursuant to the Kentucky Foundation Program Act, K.R.S. Chapter 157A, should be computed on the basis of transportation of students within that district to the nearest school available to them; and (2) Title 20 U.S.C. 1652(a), Title 20 U.S.C. 1228 and Section 314(b) of P.L. 94-94 (89 Stat. 468) are unconstitutional as violative of the separation of powers provisions and the Fifth Amendment of the Constitution of the United States.[2]

Plaintiffs' first argument when joined with the defendants' contentions merely seeks a construction of the state's Foundation Program Act. Plaintiffs urge that the correct construction of these statutes is that no state funds should be allocated to reimburse the local school district for the revenue spent in transporting students beyond the nearest adequate school available to them. The Jefferson County Board of Education contends "that the purpose of the

[2] Plaintiffs allege these statutes are unconstitutional insofar as they prohibit or restrict the use of federal funds for the transportation of students or teachers in order to overcome racial imbalance in any school or school system, or in order to carry out a plan of desegregation in any school or school system, or for the purchase of equipment for such transportation.



General Assembly in enacting the Kentucky Foundation Act (Chapter 157A) was to guarantee each pupil in the common schools of the state the opportunity to avail himself of the programs appropriate for his educational needs, regardless of geographical differences and varying economic conditions and that the purpose of the Act was to provide an efficient and equitable distribution of school funds among the common school districts."[3]

Section 183 of the Kentucky Constitution of 1890 requires the Kentucky General Assembly, by appropriate legislation, to provide for an efficient system of common schools throughout the state. Section 186 of the state constitution states: "All funds accruing to the school fund shall be used for the maintenance of the public schools of the Commonwealth, and for no other purpose, and the General Assembly shall by general law prescribe the manner of the distribution of the public school fund among the school districts and its use for public school purposes." In 1974 the legislature enacted K.R.S. 157A.010 to 157A.990, the Foundation Program Act.

In determining the proper construction of the Foundation Program Act we must consider the legislature's intention when it enacted that legislation. The general assembly set forth its intention in section 157A.010, which states in pertinent part:

> (1) It is the intention of the general assembly in enacting this legislation to guarantee to each pupil in the common schools of this state the opportunity to avail himself of those programs and services appropriate to his educational needs, regardless of geographical differences and varying economic conditions. This chapter is intended to provide for an efficient system of common schools throughout the state and an equitable distribution of school funds among the common

[3] *Brief of Defendant, Jefferson County Board of Education* at 5.

school districts in accordance with the mandates of sections 183 and 186, respectively, of the Kentucky Constitution.

All parties apparently agree that for our purposes it is the second sentence in section 157A.010 which is analytically most significant. We concur. Ergo, we must determine what the legislature intended when it declared that the Foundation Program Act was to provide for an "efficient system of common schools throughout the state" and that there shall be "an equitable distribution of school funds among the common school districts" in accordance with the mandates of sections 183 and 186 of the state constitution.

Plaintiffs argue that the state is not required constitutionally, section 183 of the state constitution, nor otherwise, section 157A.010 of the Foundation Program Act, to provide the revenue necessary to pay for the additional cost of transporting those children ordered to be used in Jefferson County since "no one can seriously contend that cross district busing is an efficient method of operating a school system . . ."[4] Plaintiffs' argument is merely a philosophical statement rather than a legal position.

We need not reach the ultimate definition of what is an "efficient system of common schools throughout the state." At the very least an efficient system of schools is a system which exists and operates. To exist the Jefferson County schools must be operated and maintained in a constitutional manner, as prescribed by the Fourteenth Amendment to the Constitution of the United States. The transportation of over 22,000 students, as provided for in the desegregation order of July 30, 1975, was and is necessary to dismantle an unconstitutional school system and to create a system compatible with the guarantees of the Fourteenth Amendment. Given the state's constitutional duty to provide public edu-

[4] *Plaintiffs' Brief in Support of Motion for Summary Judgment* at 4.



cation in Kentucky and to fund the public school system that is created, the burden of paying for the additional cost of transporting the students required to be bused under the desegregation order falls on the state, assuming the local school district is unable to meet the financial obligation of providing the required transportation. *See* KRS 158.110. In short, once the citizens of Kentucky made the voluntary commitment to educate the children of this state in public schools neither the Kentucky General Assembly nor those individuals responsible for discharging the duties imposed on them by the state constitution and the Foundation Program Act can abrogate those duties merely because the monetary obligation becomes unexpectedly large or even onerous.

The plaintiffs also argue that K.R.S. Chapter 157A should not be construed to require the state to furnish the additional costs of transporting the students required to be bused because that may lead to a disproportionately greater distribution of funds to Jefferson County at the expense of the other school districts; hence, this would violate the legislature's intention of providing "an equitable distribution of school funds among the common school districts" as required by sections 183 and 186 of the state constitution.

Plaintiffs' argument is not persuasive for two reasons. Initially, plaintiffs fail to understand that this phrase must be construed in light of the constitutional mandate of sections 183 and 186. As stated above, these sections require the state authorities to operate and maintain a school system, therefore, the school system must be operated and maintained in a constitutional fashion. Secondly, the plaintiffs' interpretation of this phrase is improper. The intent of the general assembly was that the determination of transportation costs under K.R.S. 157A.090 was to be made for *all* school districts pursuant to a similar formula. If the distributions are made under a common formula then the equitable distribution sought by the legislature is

achieved since the same factors are considered before making an allocation to any school district.

In conclusion we hold that the Superintendent of Public Instruction, in computing the transportation funds available to Jefferson County, is to include in his computation under the provisions of K.R.S. Chapter 157A, all transportation costs of Jefferson County in the identical manner in which transportation costs are determined under K.R.S. 157A.090 for all other school districts in the state.

The plaintiffs' second contention is that 20 U.S.C. 1652(a), 20 U.S.C. 1228 and section 314(b) of P.L. 94-94 are unconstitutional as violative of the separation of powers provisions and the Fifth Amendment to the United States Constitution. After careful consideration of the plaintiffs' contentions we have concluded that the arguments concerning the unconstitutionality of these statutes are meritless.

These contested federal statutes do not violate the separation of powers provisions because they do not interfere with the enforcement of the Court's desegregation order. The burden of paying the cost of transporting these students remains on those responsible for the creation of the unconstitutional school system, the local school district and the state. Plaintiffs' Fifth Amendment argument is that if the Fourteenth Amendment prohibits states from legislating against the use of state funds for court ordered busing then the Fifth Amendment prohibits the United States from enacting similar laws. Plaintiffs' argument fails because there is no federal constitutional right to an education; however the Kentucky Constitution specifically provides that the General Assembly shall provide an efficient system of schools throughout the state. Thus, the Congress is not required to enact any legislation concerning education. If Congress does enact educational legislation it may restrict the allocation of federal funds in the manner it wishes, assuming it does not violate any explicit or implicit federal



constitutional right or obligation.[5] However, in Kentucky where a state constitutional right to an education exists, the legislature and those responsible for implementing this constitutional right must abide by the guarantees in both the state constitution and the federal constitution, including the Fourteenth Amendment.

The basic factual thrust of plaintiffs' argument concerning the alleged unconstitutionality of these statutes is that "but for" these federal statutes the Commonwealth of Kentucky could or would receive federal revenue that would be used to defray the cost of transporting students, as required by our desegregation order. This argument must be rejected for several reasons: (1) There exists no federal constitutional right to an education, thus, Congress is not required to enact legislation directed to state educational systems; (2) Although Congress has voluntarily enacted legislation pertaining to education this does not require Congress to furnish the funds necessary to remedy all problems existent in a school system; and (3) the programs that Congress has enacted would not provide funds for defraying the cost of transporting these children even if the Congressional prohibition was excluded.

There is no explicit provision in the Constitution of the United States which requires the national government to assist the states in the operation of their public school systems. In fact, education itself is not among the rights afforded explicit or implicit protection under the federal constitution nor has it been classified as a "fundamental" right. *San Antonio School District* v. *Rodriquez*, 411 U. S. 1 (1973). Since there is no federal constitutional right to an education the Congress is not, and cannot be, compelled to allocate funds for educational purposes or programs.

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[5]We have determined, for the reasons herein expressed, the prohibitions existing in the challenged statutes do not violate any constitutional right or obligation.

However, Congress has voluntarily created and funded various educational programs. Albeit Congress has enacted certain educational legislation this does not mean that it has superseded the state and local school districts as the entities primarily responsible for providing the required funds to operate the school system. Clearly when Congress enacts legislation directed to a subject matter which has traditionally been considered an area of state concern, such as education, the Congress can select one aspect of the area and provide funds, neglecting other areas. *Jefferson* v. *Hackney,* 406 U. S. 535, 546-47; *Williamson* v. *Lee Optical Co.,* 348 U. S. 483, 489 (1955).

Importantly, the programs that Congress has enacted would not provide funds for defraying the cost of transporting students even if the congressional prohibition was excluded. In answer to the federal defendants first set of interrogatories the plaintiffs have listed the congressional enactments from which it is alleged that federal funds would be derived to pay the cost of transporting students under the desegregation order. Of the legislation listed[6] only the Emergency School Aid Act (ESAA) could conceivably relate to the plaintiffs' assertion that but for the prohibition included in the federal statutes there would be federal funds available to the Commonwealth to defray the cost of transporting the students who were ordered to be bused.

While the stated purpose of the ESAA is to assist in the elimination of segregation and discrimination, and to aid school children to overcome the educational disadvantages of minority group isolation, 20 U.S.C. 1601(b), the purposes

[6]Title I of the Elementary-Secondary Education Act of 1965, *as amended,* 20 U.S.C. 241a, *et seq.;* Federal Impact Aid pursuant to P.L. 81-874, 64 Stat. 1100, 20 U.S.C. 236-241; Educational Innovation and Support Programs under Title IV of the Elementary-Secondary Educational Act of 1965, *as amended,* 20 U.S.C. 841, *et seq.;* and the Emergency School Aid Act, enacted as Title VII of P.L. 92-318, 20 U.S.C. 1601, *et seq.*



for which the ESAA funds may be expended are limited to twelve highly specialized activities. 20 U.S.C. 1606(a)(1)—(12). These twelve programs are designed to supplement, *not supplant,* the efforts of the grantee in desegregating its schools. Thus, ESAA does not authorize the national government to underwrite the basic costs of desegregation; instead, it makes possible specialized programs to assist in desegregation which a local school district could not otherwise afford or provide. Of the twelve programs provided for in ESAA, 20 U.S.C. 1606(a)(1)-(12), none can be reasonably construed to permit expenditures for ordinary home-to-school bus transportation.

In brief, notwithstanding plaintiffs' assertions to the contrary, it is patent that no education assistance which the Commonwealth of Kentucky may receive from the Congress could be expended for student home-to-school transportation even if the prohibitions in the alleged unconstitutional statutes were absent.[7]

Since we have determined, for the reasons heretofore stated, that the federal statutes in question are not violative of the separation of powers provisions nor of the Fifth Amendment of the Constitution of the United States, it is unnecessary for us to address the remaining arguments advanced by the federal defendants.

Wherefore, for the foregoing reasons, it is hereby declared that Title 20 U.S.C. 1652(a), Title 20 U.S.C. 1228 and Section 314(b) of P.L. 94-94 are not violative of the separation of powers provision nor the Fifth Amendment of the Constitution of the United States, and

[7]The federal defendants' allegation that the State of Kentucky and the Jefferson County school system could not receive any federal funds which could be used to defray the cost of transporting children to their assigned school is also supported by exhibit 1 filed with the Board of Education's brief. This exhibit demonstrates no funds actually received by the Jefferson County Schools from the Department of Health, Education and Welfare could have been applied to offset the cost of transporting students.

It Is Further Declared that the Superintendent of Public Instruction, in computing the transportation funds available to Jefferson County, is to include in his computation under the provisions of K.R.S. Chapter 157A, all transportation costs of Jefferson County in the identical manner in which transportation costs are determined under K.R.S. 157A.090 for all other school districts in the state; and

It Is Ordered that the plaintiffs' motion for partial summary judgment shall be, and the same is hereby, overruled; and, that the federal defendants' and the Jefferson County Board of Education's separate motions for summary judgment shall be, and the same are hereby, granted. Costs are assessed against the plaintiffs.

March 19, 1976

(s) James F. Gordon, Senior Judge
United States District Court

CC to:
All Council of Record



# UNITED STATES DISTRICT COURT

**WESTERN DISTRICT OF KENTUCKY**
**AT LOUISVILLE**

**No. C75-0305-L(G)**

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JULIAN M. CARROLL, Governor, Commonwealth of Kentucky, et al. - - - *Plaintiffs*

*v.*

DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, UNITED STATES OF AMERICA, et al. - - - - - - - - *Defendants*

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## JUDGMENT

For all of the reasons stated in the Memorandum Opinion and Order of this day,

It Is Hereby Declared that Title 20 U.S.C. 1652(a), Title 20 U.S.C. 1228 and Section 314(b) of P.L. 94-94 are not violative of the separation of powers provisions nor the Fifth Amendment of the Constitution of the United States, and

It Is Further Declared that the Superintendent of Public Instruction, in computing the transportation funds available to Jefferson County, is to include in his computation under the provisions of K.R.S. Chapter 157A, all transportation costs of Jefferson County in the identical manner in which transportation costs are determined under K.R.S. 157A.090 for all other school districts in the state; and

It Is Ordered that the plaintiffs' motion for partial summary judgment shall be, and the same is hereby, over-

ruled; and, that the federal defendants' and the Jefferson County Board of Education's separate motions for summary judgment shall be, and the same are hereby, granted. Costs are assessed against the plaintiffs.

(s) James F. Gordon, Senior Judge
United States District Court

March 19, 1976
Copies to:
All Counsel of Record



# UNITED STATES DISTRICT COURT

**WESTERN DISTRICT OF KENTUCKY**
**AT LOUISVILLE**

**Civil Action No. 76-0248-L(G)**

JEFFERSON COUNTY BOARD OF EDUCATION, - *Plaintiff,*

*v.*

JULIAN M. CARROLL, Governor, Commonwealth of Kentucky; and
JAMES GRAHAM, Superintendent of Public Instruction, Commonwealth of Kentucky, - *Defendants.*

**MEMORANDUM OPINION AND ORDER—**
Entered August 27, 1976

We are asked in this action to declare unconstitutional House Bill 168 enacted by the Kentucky General Assembly and signed by Governor Julian Carroll on March 29, 1976. Because of the emergency provision written into Section 4 of the statute, H.B. 168 became effective upon the approval of the Governor on March 29, 1976.

This legislation followed our decision of March 19, 1976, in Civil Action 75-0305-L(G), wherein we held:

> Given the state's constitutional duty to provide public education in Kentucky and to fund the public school system that is created, the burden of paying for the additional costs of transporting the students required to be bused under the desegregation order falls on the state, *assuming the local school district is unable to meet the financial obligation of providing the required transportation.*

*Carroll* v. *Department of Health, Education & Welfare*, 410 F. Supp. 234, 238 (W.D. Ky. 1976). (Emphasis added). Albeit the legislature responded to our March 19, 1976, decision by immediately enacting House Bill 168, this does not signify the unconstitutionality of this legislation, even though several legislators publicly stated they considered H.B. 168 to be unconstitutional and would be held unconstitutional in the federal courts.[1]

House Bill 168 has three substantive sections and the plaintiff asks the Court to declare unconstitutional each of these sections. No party has requested the Court to convene a three-judge panel to hear the merits of this case and we have independently determined that a three-judge court is not needed to rule on the issues presented.

We shall first consider Section 3 of H.B. 168. That section consists of four paragraphs. We shall discuss the paragraphs separately.

Paragraphs 1 and 2 in essence state that local school boards may provide money from their general funds for the transportation of elementary school students to the nearest school able to accommodate the child in his particular grade. The obvious effect of these paragraphs is that it allows or authorizes local school boards to refuse to expend funds for the transportation of elementary school students beyond the nearest school able to provide space for the student in the appropriate grade level.

The defendant contends these first two paragraphs are not unconstitutional because the legislature has not *prohibited* school boards from expending their funds in transporting elementary school students beyond the nearest available school which can seat that child in his required class but merely gives the school board that *discretion* if it wishes to avail itself of that authority. This argument is

[1] *The Courier Journal & Louisville Times*, March 21, 1976, "Assembly Revives and Passes Bill on Busing Funds," at A 1, 24.



unpersuasive when juxtaposed the legal responsibilities of the Jefferson County Board of Education. Paragraphs 1 and 2 are patently unconstitutional insofar as they give the Jefferson County Board of Education the discretion to refuse to provide transportation for elementary school students beyond the nearest school able to provide a space in the appropriate classroom for the transported student. This discretion has the effect of annulling our desegregation order of July 30, 1975, which *requires* the Jefferson County Board of Education to dismantle its previously unconstitutional school system by transporting some 22,000 students to assigned schools within the school district. Thus, if the Court determined that insofar as Jefferson County was concerned paragraphs 1 and 2 in Section 3 of H.B. 168 were constitutional, we would in effect be allowing the General Assembly of Kentucky to circumvent our desegregation order. We cannot take such a position. *Bradley* v. *Milliken*, 433 F. 2d 897, 902 (6th Cir. 1970).

In conclusion paragraphs 1 and 2 in Section 3 of H.B. 168 are unconstitutional insofar as they are made applicable to the Jefferson County Board of Education because they (1) conflict with this Court's duty to remove all remaining vestiges of state-imposed segregation in the Jefferson County school district, a duty imposed on this Court by the Sixth Circuit Court of Appeals in its order of December 11, 1974. *Newburg Area Council, Inc.* v. *Board of Education*, 510 F. 2d 1358 (6th Cir. 1974); *See also Newburg Area Council, Inc.* v. *Gordon*, 521 F. 2d 578 (6th Cir. 1975); and (2) conflicts with this Court's desegregation order issued July 30, 1975, a plan which was and is necessary to dismantle an unconstitutional school system and to create a system compatible with the guarantees of the Fourteenth Amendment.

Paragraph 3 in Section 3 of H.B. 168 is conceded by the defendants to be unconstitutional under Section 51 of the Kentucky Constitution. *Defendant Carroll's Brief* at

10. Because the defendants have conceded the unconstitutionality of paragraph 3 under Kentucky's Constitution, we shall not address whether this paragraph might also be unconstitutional under the Constitution of the United States.

We do not believe there is any federal constitutional infirmity with paragraph 4 in Section 3 of H.B. 168. We agree with the defendants, however, that if the Department of Education or the Jefferson County Board of Education attempted in the future to frustrate or cripple this Court's order of July 30, 1975, by adoption of regulations or rules pursuant to this paragraph, the Court could at that time, upon appropriate motion, strike down the offensive rule or regulation.

Sections 1 and 2 of H.B. 168 amend KRS 157A.090 and 157.370 respectively. Both of these amendments were needed for the general assembly in 1974 enacted KRS 157A.090 which replaced KRS 157.370. Sections 34 and 36 in House Bill 4 enacted by the 1976 general assembly, repealed KRS 157A.090 effective July 1, 1976, and re-enacted KRS 157.370. Thus, the general assembly in order to cover the entire fiscal period commencing March 29, 1976, and continuing into the future, had to amend both KRS 157A.090 and 157.370, even though KRS 157A.090 is now repealed. Given this legislative history and notwithstanding the defendants' contention that Section 1 of H.B. 168 "is probably meaningless," *Defendant Carroll's Brief* at 2 n.1, we must consider the constitutionality of Section 1 for that provision addresses the monetary allocation structure of the Minimum Foundation Program from March 29, 1976, to July 1, 1976, while, Section 2 concerns the same allocation structure after June 30, 1976.

The basic issue concerning the constitutionality of Sections 1 and 2 in H.B. 168 is whether these sections limit



the type of transportation costs which can be used to determine the plaintiff's per pupil per day transporation cost. Concerning this question, the defendants' position is:

> The [Jefferson County] Board [of Education] can point to no provision in those Sections 1 and 2 which limits the types of transportation costs used to determine the Board's per pupil per day transportation cost. A simple reading of Sections 1 and 2 of the Act itself make it abundantly clear that those Sections in no way change the item of transportation costs which go to determine that cost, and Mr. [Arnold] Guess so testified. (Guess Dep. 9).

*Defendant Carroll's Brief* at 8.

We disagree with the defendants' contention that those administrators who must carry out the mandate of Sections 1 and 2 in H.B. 168 do not believe that legislation was designed to eliminate certain transportation costs which but for the statute would have been included in determining the per pupil per day transportation cost. Mr. Arnold Guess, a deputy director of the Bureau of Administration and Finance, testified:

> Q. 23. Now, are you familiar with the provisions of House Bill 168?
>
> A. Yes, I am.
>
> Q. 24. Now, with relation to the costs that are to be included in making that determination under that bill, will they be any different from what they were for 75-76 and previous school years?
>
> A. House Bill 168 does not specifically address the cost that would be involved in Series 500 of our Annual Financial Report, which are the costs that are used in making our per pupil cost estimate.
>
> Q. 25. Then, does it, according to your interpreta-

tion of that act, does not make any amendment to the factors that go into that account 500?

A. *Yes, I think it does. I think it anticipates that there might be costs incurred during the past year that we're just operating in fiscal 1976, that had not heretofore been included in the calculation that we made. And I believe that the Bill attempts to anticipate those costs by providing that once the smooth graph, that's used, reaches the lowest cost of pupil density group that the graph be extended in a straight line. I believe that provision anticipates the possibility of a higher density group or an equally dense group having abnormally high per pupil cost. Now, I think that's the reason that that was included in the Bill.*

Q. 26. Well, but either I don't understand you or you don't understand me. I'm still trying to find out if House Bill 168 has made any change in the different items of transportation costs?

A. It has not, no.

Q. 27. All right, sir, that's what I'm trying to find out. Then, it will be the same in future years under House Bill 168 as it has been for the immediate, past current school year, and previous years?

A. Yes.

Q. 28. Now, what are those items again, now, that go into that?

A. Those items are the cost of gasoline, lubrication, tires, normal upkeep of the buses, the cost of driver salaries, the cost of administration of the program, a factor for school bus depreciation, normal clerical costs, *and those things that are normally associated with a transportation system.*

Q. 29. And it would not include such items as guards, monitors, or security provided for the buses when they're not in use?



A. No, it would not.

Q. 30. And in the past, has that kind of cost ever been included before?

A. To my knowledge, it has never been included with the possible exception of handicapped children's buses where it's necessary that an attendant be on the bus.

This candid testimony of Mr. Guess, albeit somewhat confused, demonstrated that those who are assigned the task of implementing the commands of Sections 1 and 2 in H.B. 168 believe the legislature's intention in enacting those sections was to exclude certain costs which are *directly* related to transporting students in Jefferson County, such as security guards and monitors. The fact that these costs were not incurred in prior years as normal transportation costs is irrelevant for in those years monitors and security guards, and other such expenses, were not necessary to operate school buses within the framework of a constitutional school system. Unfortunately, today in Jefferson County such expenses are necessary to transport students to and from their assigned schools.

The implication from Mr. Guess' testimony is that prior to the enactment of Sections 1 and 2 in H.B. 168 *all* normal transportation costs which were incurred by the local school district in operating its transportation system were included in the per pupil per day transportation cost. Such normal transportation costs in Jefferson County since the opening of school in school years 1975-76 include, by necessity, monitors and security guards. These costs, however, by the defendant's witness' own admission would be excluded under H.B. 168 and significantly, Mr. Guess testified he believed the purpose of Sections 1 and 2 in this bill was to achieve that result.

A state legislature cannot under our federal constitution cripple a federal court's desegregation order by enacting subtly drafted legislation which on its face appears constitutional but which in practice has the effect of eliminating transportation costs which otherwise would have been included in determining the monetary allotment granted to Jefferson County pursuant to the Minimum Foundation Program Act. If the Court permitted such a result our desegregation order entered July 30, 1975, would soon deteriorate into a mere piece of paper which political forces under the pressures of current public opinion could render totally ineffective. This Court believes it is on solid legal soil in declaring unconstitutional any legislative enactment which either patently or subtly attempts to annul this Court's desegregation order or the effectiveness of that order. We have determined that Sections 1 and 2 of H.B. 168 are for the aforestated reasons constitutionally infirm in that they attempt to abate this Court in its duty to enforce its desegregation order and the mandate of the state-imposed segregation from the Jefferson County school district.

WHEREFORE, FOR THE FOREGOING REASONS, it is hereby DECLARED:

1. Sections 1 and 2 of House Bill 168 are unconstitutional in that those provisions are attempts to prevent this Court from effectively enforcing its desegregation order and the mandate of the Sixth Circuit Court of Appeals that we remove all remaining vestiges of state-imposed segregation in the Jefferson County school district; and

2. Paragraphs 1 and 2 in Section 3 of House Bill 168 are unconstitutional insofar as they are made applicable to the Jefferson County Board of Education in that said paragraphs are in direct conflict with our



desegregation order and the aforestated mandate from the Sixth Circuit Court of Appeals; and

3. Paragraph 3 in Section 3 of House Bill 168 is invalid in that it, by the defendants' own admission, conflicts with Section 51 of the Kentucky Constitution; and

4. Paragraph 4 in Section 3 of House Bill 168, as written is not violative of any federal constitutional right, guarantee or protection; and

5. Costs are assessed against the defendants.

August 24, 1976

(s) James F. Gordon
Senior United States District Judge

Copies to:
Counsel of record

# UNITED STATES DISTRICT COURT

**WESTERN DISTRICT OF KENTUCKY**
**AT LOUISVILLE**

**Civil Action No. 76-0248-L(G)**

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JEFFERSON COUNTY BOARD OF EDUCATION, - *Plaintiff,*

*v.*

JULIAN M. CARROLL, Governor, Commonwealth of Kentucky; and

JAMES GRAHAM, Superintendent of Public Instruction, Commonwealth of Kentucky, - *Defendants.*

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**JUDGMENT**—Entered August 27, 1976

For all the reasons stated in the Memorandum Opinion and Order of this day,

IT IS ORDERED AND DECLARED:

1. Sections 1 and 2 of House Bill 168 are unconstitutional in that those provisions are attempts to prevent this Court from effectively enforcing its desegregation order and the mandate of the Sixth Circuit Court of Appeals that we remove all remaining vestiges of state-imposed segregation in the Jefferson County school district; and

2. Paragraphs 1 and 2 in Section 3 of House Bill 168 are unconstitutional insofar as they are made applicable to the Jefferson County Board of Education in that said paragraphs are in direct conflict with our desegregation order and the aforestated mandate from the Sixth Circuit Court of Appeals; and

3. Paragraph 3 in Section 3 of House Bill 168 is invalid in that it, by the defendants' own admission, con-



flicts with Section 51 of the Kentucky Constitution; and

4. Paragraph 4 in Section 3 of House Bill 168, as written, is not violative of any federal constitutional right, guarantee or protection; and

5. Costs are assessed against the defendants.

August 24, 1976

(s) James F. Gordon
Senior United States District Judge

## APPLICABLE PROVISIONS OF EMERGENCY SCHOOL AID ACT, PUBLIC LAW 92-318 (TITLE 20 U.S.C. §1601, et seq.)

**Title 20 U.S.C.—**

**§ 1601. Congressional findings and purpose**

(a) The Congress finds that the process of eliminating or preventing minority group isolation and improving the quality of education for all children often involves the expenditure of additional funds to which local educational agencies do not have access.

(b) The purpose of this chapter is to provide financial assistance—

(1) to meet the special needs incident to the elimination of minority group segregation and discrimination among students and faculty in elementary and secondary schools; * * *.

**Title 20 U.S.C.—**

**§ 1605. Eligibility for assistance; grant and contract authority; limitation; ineligibility, waiver; waiver application, approval; notice to congressional committees**

(a)(1) The Assistant Secretary is authorized to make a grant to, or a contract with, a local educational agency—

(A) which is implementing a plan—

(i) which has been undertaken pursuant to a final order issued by a court of the United States, or a court of any State, or any other State agency or official of competent jurisdiction, and which requires the desegregation of minority group segregated children or faculty in the elementary and secondary schools of such agency, or otherwise requires the elimination or reduction of minority group isolation in such schools; * * *.



**Title 20 U.S.C.—**

**§ 1606. Authorized activities—Programs and projects**

(a) Financial assistance under this chapter (except as provided by Sections 1607, 1608, and 1610 of this title) shall be available for programs and projects which would not otherwise be funded and which involve activities designed to carry out the purpose of this chapter stated in Section 1601(b) of this title: [here follows a description of specific programs and projects] * * *.

**Title 20 U.S.C.—**

**§ 1607. Special programs and projects; grant and contract authority; bilingual education; eligibility, program committee**

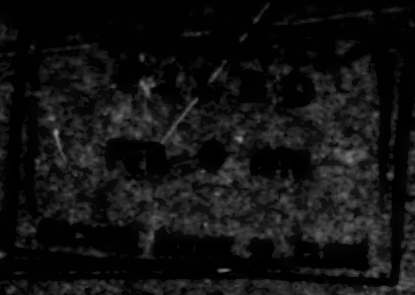
(a)(1) Amounts reserved by the Assistant Secretary pursuant to section 1603(b)(2) of this title, which are not designated for the purposes of clause (A) or (B) thereof, or for section 1612 of this title shall be available to him for grants and contracts under this subsection.

(2) The Assistant Secretary is authorized to make grants to, and contracts with, State and local educational agencies, and other public agencies and organizations (or a combination of such agencies and organizations) for the purpose of conducting special programs and projects carrying out activities otherwise authorized by this chapter, which the Assistant Secretary determines will make substantial progress toward achieving the purposes of this chapter. * * *

(b)(1) From not more than one-half of the sums reserved pursuant to section 1604(a)(3) of this title, the Assistant Secretary, in cases in which he finds that it would effectively carry out the purpose of this chapter stated in section 1601(b) of this title, may assist by grant or contract any public or private nonprofit agency, institution, or organization (other than a local educational agency) to carry

out programs or projects designed to support the development or implementations of a plan, program, or activity described in section 1605 of this title.

(2) From the remainder of the sums reserved pursuant to section 1604(a)(3) of this title, the Assistant Secretary is authorized to make grants to, and contracts with, public and private non-profit agencies, institutions, and organizations (other than local educational agencies and non-public elementary and secondary schools) to carry out programs or projects designed to support the development or implementation of a plan, program, or activity described in section 1605 of this title. * * *



No. 71-[illegible]

# In the Supreme Court of the United States

OCTOBER TERM, 1971

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JULIAN M. CARROLL, GOVERNOR OF KENTUCKY, ET AL.,
*Petitioners*

v.

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE, ET AL.

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

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## MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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WADE H. MCCREE, JR.,
*Solicitor General,*
*Department of Justice,*
*Washington, D.C. 20530.*

# In the Supreme Court of the United States

OCTOBER TERM, 1977

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No. 77-722

JULIAN M. CARROLL, GOVERNOR OF KENTUCKY, ET AL.,
PETITIONERS

*v.*

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE, ET AL.

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

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## MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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Petitioners, the Governor of Kentucky and the Commonwealth of Kentucky, seek a declaration that three statutes, which explicitly forbid the expenditure of federal aid-to-education funds on home-to-school transportation designed to desegregate public schools, are unconstitutional.

This case involves the school system of Jefferson County, Kentucky, in which racial discrimination took place. That school system has been ordered to reassign students to achieve desegregation; the reassignment cannot be accomplished without additional home-to-school transportation.[1] Because Kentucky must, under

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[1]See *Newburg Area Council, Inc.* v. *Board of Education*, 489 F. 2d 925 (C.A. 6), remanded for reconsideration, 418 U.S. 918, reaffirmed on remand, 510 F. 2d 1358 (C.A. 6), certiorari denied, 421 U.S. 931;

state law, give financial assistance to local school systems, the state must share in the expense of the transportation program.[2] Cf. *Milliken* v. *Bradley*, No. 76-447, decided June 27, 1977.

The Governor of Kentucky, seeking money to purchase and operate the necessary buses, filed suit against the Department of Health, Education, and Welfare. The Governor argued that the three statutes forbidding expenditure of federal funds for home-to-school transportation[3] are unconstitutional, and that the federal government therefore must accept applications for grants to help offset the cost of Jefferson County's busing program. The district court held (Pet. App. 20A-23A) that the three statutes are constitutional but that, even if they were not, no relief would be possible because no federal statute authorizes financial assistance to defray costs of court-ordered transportation. The court of appeals affirmed on the latter ground and did not reach the constitutionality of the statutes (*id.* at 6A-7A).

This decision is correct, and it does not conflict with the decision of any other court. The three statutes to which petitioners object are redundant; they do not "cut off" federal funds for any project, because no other statute authorizes the expenditure of funds for transportation. A central premise of the aid-to-education program is that federal money can be spent only to increase the resources of school systems. Federal money may not be used to replace or supplant funds available from other sources.

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*Newburg Area Council, Inc.* v. *Gordon*, 521 F. 2d 578 (C.A. 6); *Cunningham* v. *Grayson*, 541 F. 2d 538 (C.A. 6), certiorari denied, 429 U.S. 1074.

[2]See Pet. App. 2A-6A. Petitioners do not seek review of this aspect of the court of appeals' decision. Pet. 8.

[3]See 88 Stat. 519, 20 U.S.C. (Supp. V) 1228; 86 Stat. 371, 20 U.S.C. (Supp. V) 1652(a); Pub. L. 94-94, Section 315(b), 89 Stat. 474.



See, *e.g.*, 86 Stat. 363, 20 U.S.C. (Supp. V) 1609(a)(10). Because a federal court has required additional transportation in Jefferson County, the County or the State must provide it. Any federal funds would serve only as a substitute for funds the County or State already must supply, and federal assistance thus would not improve the school program or add any new activities to it. There is therefore no affirmative authorization to pay federal monies for the purposes petitioners have in mind.

Petitioners' argument that the Emergency School Aid Act, 86 Stat. 354, as amended, 20 U.S.C. (Supp. V) 1601-1619, authorizes grants to defray the costs of busing is unconvincing. Petitioners disregard the limitations we discuss above and cite, instead, a portion of that Act's statement of purposes (Pet. 11). The statement of purposes does not authorize federal officials to disregard the limitations of the statute or to provide money for anything other than the 15 school programs set out in Section 1606(a).[4] Transportation simply is not among the programs. Moreover, the Department of Health, Education, and Welfare, which administers that Act, has never interpreted the Act to allow expenditures for transportation, and that view is entitled to great weight. *Red Lion Broadcasting Co.* v. *Federal Communications Commission*, 395 U.S. 367, 381; *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 433-434; *Udall* v. *Tallman*, 380 U.S. 1, 16.

The three statutes are constitutional at any rate for, as the district court held, Congress has no constitutional obligation to pay for school busing or any other facet of local education (Pet. App. 20A-21A). Petitioners' contention (Pet. 8-9) that the district court's decision adopts a dual standard, forbidding Kentucky to avoid paying for school busing while allowing the federal government to do so, is simplistic. States must obey the Constitution, and

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[4]At the time of the district court's decision, Section 1606(a) included only 12 programs. Since then, Congress has added 3 more. See Pub. L. 94-482, Section 321(c)(2), 90 Stat. 2217.

the federal government is not obliged to pay the expenses of their doing so. Congress may require the states (and their subdivisions) to pay the full cost of correcting conditions that the states (and their subdivisions) have brought about in violation of the Constitution. The United States did not violate the constitutional rights of the children in Jefferson County; the County and the State did. That is ample reason for Congress to require the County and the State, but not the United States, to pay for the remedy. Indeed, states may well be less likely to violate a citizen's rights today if it means paying the costs of making good those rights in the future.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
*Solicitor General.*

FEBRUARY 1978.

DOJ-1978-02